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The New Deference-Based Approach To Adjudicating Political Questions In Corporate Ats Cases: Potential Pitfalls And Workable Fixes

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THE NEW DEFERENCE-BASED APPROACH TO ADJUDICATING POLITICAL QUESTIONS IN CORPORATE ATS CASES: POTENTIAL PITFALLS AND WORKABLE FIXES

*Seth Korman**

Much has been made of executive-branch attempts to exert control over cases brought against corporations under the Alien Tort Statute. Under the Bush Administration, the executive branch repeatedly sought to influence district court opinions through targeted letters to the court or statements of interest. These letters, frequently written by the State Department legal advisor, sought to convince courts that adjudication of claims against corporate defendants would have an adverse effect on U.S. foreign policy, thus triggering the political question doctrine and forcing the courts to rule the claims nonjusticiable. Though some courts have, in fact, deferred entirely to the executive branch, others have stood firm. In the process, and through a creative streamlining of the Baker v. Carr political question doctrine analysis, courts have inadvertently created a new two-prong method of analyzing political questions in corporate ATS cases. While this new analysis simplifies adjudicating these cases, and has so far allowed courts to resist executive branch intrusion, it leaves open such a possibility.

This article first demonstrates how, through this new analysis, courts have stumbled upon a way to reasonably assess executive claims of foreign-policy infringement while at the same time maintaining some level of deference to the executive branch's judgment. Through an analysis of State Department letters and the courts' respective responses, it reveals a shift in the Baker analysis away from the classic six-factor test towards a more streamlined, two-prong up-or-down assessment. This new approach both simplifies political question doctrine adjudication and prevents the executive branch from unilaterally curtailing claims of human rights violations against large corporate defendants.

Second, this article argues that this approach does not conclusively address remaining separation of powers concerns, and thus needs to go further. A strengthened up-or-down approach that actually probes the merits of executive branch argumentation would prevent the executive from subverting—through either the old status quo reliance

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on Baker or a weak up-or-down approach—a powerful judicial branch tool for holding responsible corporate human rights violators.

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“For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time

would in fact risk a potentially serious adverse impact on significant interests of the United States. . . .”¹

“For reasons stated below, and in light of the views communicated to us by the Colombian government, the State Department believes that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States.”²

“In our judgment, continued adjudication of the claims . . . would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations.”³

INTRODUCTION

Over the past decade, the executive branch, particularly under the George W. Bush Administration, has discovered a loophole through which to insert itself and its opinions into the judicial proceedings in Alien Tort Statute (“ATS”) cases.⁴ As expected and in accordance with that administration’s disdain for the statute,⁵ the executive branch has, in most cases, taken the side of defendant corporations. Through targeted backdoor letters or “statements of interest,” the executive has advocated for dismissal on grounds that adjudication will threaten U.S. foreign policy interests.⁶ The three introductory quotes above are merely a few among many such arguments. Unique

¹ Letter from William H. Taft, Legal Advisor, U.S. Department of State, to Judge Louis F. Oberdorfer, District Court for the District of Columbia, July 29, 2002 [hereinafter Exxon Statement of Interest], available at <http://www.cja.org/legalResources/StateDepartmentBriefs/DOSexxon.pdf>.

² Letter from William H. Taft, Legal Advisor, U.S. Department of State, to Daniel Meron, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Dec. 23, 2004 [hereinafter Mujica Statement of Interest], available at <http://www.state.gov/s/l/2004/78089.htm>.

³ Letter from William H. Taft, Legal Advisor, U.S. Department of State, to Robert D. McCallum, Jr., Assistant Attorney General, U.S. Department of Justice, Oct. 31, 2001 [hereinafter Sarei Statement of Interest], available at <http://www.state.gov/documents/organization/16529.pdf>.

⁴ The statute, also known as the Alien Tort Claims Act, was part of the Judiciary Act of 1789, and is codified at 28 U.S.C. §1350 (2009). It reads, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

⁵ See, e.g., Richard Hermer & Martyn Day, *Helping Bush Bushwack Justice*, GUARDIAN, Apr. 27, 2004, available at <http://www.guardian.co.uk/world/2004/apr/27/usa.humanrights> (looking at the Bush Administration’s attempts to gut the Alien Tort Claims Act).

⁶ See *supra* notes 1–3.

too is that although the government's opinion is often solicited by the courts, the executive branch (and the executive branch alone) is essentially requested to add its persuasive authority at the district court level.⁷ While the executive branch, along with any other nonparties, may file an amicus brief⁸ (though non-executive amici almost never do so at the district court level), rarely in district court jurisprudence does the executive branch weigh in at such an early stage in litigation.

Courts make this exception because these ATS cases often trigger the political question doctrine—that contentious matter of jurisdiction by which a court can essentially deprive itself of its own power of judicial review. Because foreign-affairs powers are constitutionally granted primarily to the executive⁹ and to a lesser extent the legislative branch,¹⁰ courts are understandably cautious in making rulings that may be perceived as foreign policy decision making. However, as executive intrusion and the use of statements of interest become more commonplace, and as courts either defer to the executive branch or incorporate executive foreign-policy concerns into their legal formulations, such intrusion complicates political question doctrine adjudication.

This is dangerous. While such deference may no longer affect perceptions of the courts' relevancy or undermine legitimacy,¹¹ it does begin to establish a *sine qua non* situation in which adjudication on issues touching foreign policy concerns requires executive input, no matter the courts' constitutional prerogatives. Yet in ATS cases where the defendants invoke the political question doctrine, such deference now seems mandatory. Even if the court does not completely defer to the executive branch considerations, it still heavily factors such considerations into its decision making.¹²

The political question doctrine, particularly as it pertains to foreign affairs, is somewhat of a paradox. Courts cannot rule on a matter if such a decision is best suited for the executive branch, yet at the same time, courts frequently do not have the information or where-withal—without seeking the executive's opinion—to make an objective judgment on whether a particular foreign affairs concern is in fact best

⁷ *Id.*

⁸ See FED. R. APP. P. 29(a).

⁹ See U.S. Const. art. II, § 2.

¹⁰ U.S. Const. art. I, § 8, cl. 3. However, the executive maintains control of the state's general foreign policy.

¹¹ See Michael J. Glennon, *The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Foreign Affairs and the Political Question Doctrine*, 83 A.J.I.L. 814, 816 (1989).

¹² See, e.g., *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1206 (C.D. Cal. 2002) *rev'd in part*, *Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005).

left to the executive. Put plainly, in certain cases, the court must try to determine if the executive branch has plenary jurisdiction over an issue by means other than simply asking it, even though only the executive really has the power to decide whether such an issue is in fact a political question.

Because the relevant issues of foreign policy tend to fall within the executive branch, courts cannot know whether a matter is of foreign policy concern without consulting the State Department or White House, yet deference to the executive's opinion defeats the purpose of judicial review entirely. It is thus quite clear why these cases do not arise with frequency, and why no bright line rule governing the adjudication of foreign affairs political question doctrine issues has been established.

Instead, as can be seen in different courts' adjudication of ATS political question doctrine cases, and as will be demonstrated in this article,¹³ courts have taken a more streamlined approach. While they have nominally followed the political-question factor analysis devised in *Baker v. Carr*,¹⁴ the results of many of the most recent corporate ATS cases reveal a striking pattern, and indicate a near abandonment of *Baker* in favor of a reserved deference to the executive branch. Despite this deference, however, the courts have so far managed to retain their authority, standing firm in the face of executive-branch attempts to undermine the over 200-year-old Alien Tort Statute¹⁵ through the use of the political question doctrine. Yet this judicial bulwark may not last.

This article seeks to demonstrate that recent ATS political question doctrine jurisprudence, despite an apparent adherence to the *Baker* six-factor analysis, in fact reveals a near-abandonment of *Baker*. Instead, courts have adopted a more streamlined approach where the opinions of and deference to executive concerns have become the most important factors under consideration. While these cases do not portend an end to the *Baker* analysis, they do indicate that courts are making an educated up-or-down decision on whether the political question applies, and not, as others have argued,¹⁶ simply deferring to the executive branch. Yet this is still dangerous. By simplifying their method of adjudication, courts are leaving open a path for future exec-

¹³ See *infra* Parts III–IV.

¹⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁵ 28 U.S.C. §1350 (2009).

¹⁶ See, e.g., *Developments in the Law: Access to the Courts*, 122 HARV. L. REV. 1151, 1200 (2009); Derek Baxter, *Protecting the Power Of The Judiciary: Why the Use of State Department "Statements Of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, *passim* (2006).

utive argumentation that under this new approach may require courts to defer unquestioningly to the executive.

This article proceeds in five parts. Part I discusses the ATS and the political question doctrine as they pertain to the executive branch's foreign affairs powers. Part II looks at the actual interplay between the executive branch and the courts in corporate ATS cases, and discusses the use of State Department letters and statements of interest. Part III briefly deconstructs nine important recent ATS cases where, with one exception, statements of interests were analyzed by courts and relied on in their decision making.¹⁷ Part IV then analyzes the courts' reasoning in these cases, and demonstrates the emergence of an outcome pattern derived not from a *Baker* analysis, but instead from an *ad hoc* reaction to an assessment of the executive branch's submitted letter or statement of interest. Finally, Part V argues that despite courts' refusal to accede to executive branch concerns, this new approach still raises separation of powers concerns and remains untenable unless courts receive adequate means to assess the executive branch argumentation; it then offers generally a potential fix through which courts could better assess executive opinions and avoid uncritically deferring to the executive branch.

I. THE ALIEN TORT STATUTE, THE POLITICAL QUESTION DOCTRINE, AND FOREIGN AFFAIRS POWERS

Histories of both the ATS and the political question doctrine have been discussed with some frequency.¹⁸ This article briefly reviews the relatively short histories of both with an emphasis on their nexus as it pertains to ATS cases. What is most important, and what warrants discussion, is how the statute and the doctrine came to collide, and why they are now viewed by many, notably members of the second Bush administration, to conflict with one another.

¹⁷ This Part is further expanded upon in the Appendix, which looks at these nine cases in much greater detail.

¹⁸ See generally Richard L. Hertz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 211–13 (2008) (providing a more detailed history of the ATS); Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L. L.J. 1, 3–7 (2007); Margarita S. Clarens, Note, *Deference, Human Rights And The Federal Courts: The Role Of The Executive In Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, 417–23 (2007). Corrie v. Caterpillar, 503 F.3d 974, 979–82 (9th Cir. 2007) provides an explanation of the history and applicability of the political question doctrine in the foreign policy context. See also Glennon, *supra* note 11; Lisa R. Price, Note, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323, 333–44 (2006).

Though there has been much written about both, each remains murky in its own way: the lack of ATS case law precludes the creation of a specific set of standards to assess justiciability, while the inherent vagueness¹⁹ of the *Baker* test does not always produce expected outcomes.²⁰ As such, the combination of the two has presented the opportunity for the courts to shape such jurisprudence; fortunately, and to the Bush administration's chagrin, the Court failed to comply in *Sosa v. Alvarez-Machain*, refusing to outlaw the ability of foreigners to sue in U.S. courts.²¹ The executive, unhappy with the decision in *Sosa*, has thus tried to use the political question doctrine to do what it could not accomplish in *Sosa*. At some point, a political question doctrine case that deals with foreign policy deference will likely percolate to the Supreme Court. Hopefully, and as will be discussed in Part II, the Court will not veer from the direction currently taken by courts, and, as in *Sosa*, will continue to prevent the executive from subverting what many see as the powerful and symbolic ATS.²²

A. *The Alien Tort Statute*

The Alien Tort Statute, also known as the Alien Tort Claims Act ("ATCA"), has been simultaneously called a "nightmare"²³ as well as one of "the most progressive and pro-human rights law[s] on the American statute books. . . ."²⁴ Of course, it has only taken on this love-hate role since 1980, when the Second Circuit in *Filartiga v. Pena-Irala* reinvigorated (or reminded human-rights proponents of) the ATS and its potentially wide jurisdictional reach,²⁵ especially as the "laws of nations" have grown to encompass such *jus cogens* as

¹⁹ See Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1165 (2002).

²⁰ *Id.* at 1167.

²¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

²² Many scholars have noted the human-rights and general symbolic significance of the ATS. See, e.g., Anne-Marie Slaughter & David Bosco, *Plaintiffs Diplomacy*, 2000 FOREIGN AFFAIRS Sep./Oct. (2000); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L. L. 461, 493 (1989) ("The larger significance of the Statute today is a window on the past. It recalls an era in which national policymakers, charged with leadership of a younger and much more vulnerable nation, nevertheless factored 'honor' and 'virtue' into their calculus of the national interest.").

²³ GARY C. HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 1 (2003).

²⁴ Hermer & Day, *supra* note 5.

²⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (1980).

prohibitions on torture and genocide.²⁶ As plaintiffs around the world soon realized, U.S. courts now offered a forum to resolve their often quite real grievances; all they needed was an action “for a tort only, committed in violation of the law of nations.”²⁷

Since 1980, over one hundred ATS claims have been filed in federal courts against a variety of misfeasors, including foreign governments,²⁸ strongmen,²⁹ and multinational corporations.³⁰ It is this last category that has proven the most interesting. As the Supreme Court in *Sosa* did not foreclose the ability to sue private actors in tort for violations of international law, the ATS has, in the past five years, become a legal mechanism for plaintiffs seeking compensation in U.S. courts for corporate human rights violations.³¹

Unlike foreign governments or officials that can claim sovereign immunity³² or rely on the act of state doctrine for immunity from ATS suits, corporate defendants lack an obvious jurisdictional loophole to escape ATS jurisdiction. And unlike unsympathetic war criminals, these corporate defendants are frequently influential and generally contribute to the global and political economy. Consequently, these corporate cases raise the thorniest issues.

On one hand, the defendant corporations are often large conglomerates that are economically and diplomatically important to both the United States and the foreign countries in which they operate. On the other, they likely have committed (or aided in and abetted the commission of) torts in violation of international law. As a result, and as will be seen in the cases to be discussed,³³ the U.S. government must choose sides and support either the large multinational corporation or

²⁶ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, available at www.un.org/documents/resga.htm hyperlink (follow “1948” hyperlink and scroll to “260(III)” hyperlink) (last visited Oct. 2, 2009); *Princz v. Germany*, 307 U.S. App. D.C. 102, 109 (1994) (“According to one authority, a state violates *jus cogens*, as currently defined, if it: ‘practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.’”).

²⁷ *Filartiga*, 630 F.3d at 887.

²⁸ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

²⁹ See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

³⁰ See, e.g., *Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005).

³¹ See, e.g., Note, *Organizational Irrationality and Corporate Human Rights Violations*, 122 HARV. L. REV. 1931 (2009).

³² See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2006) (“[F]oreign state[s] shall be immune from the jurisdiction of the courts of the United States.”).

³³ See *infra* Part III.

the individual victims of gross human rights violations. Under the second Bush administration, during which the vast majority of notable corporate ATS cases were heard, the executive branch almost always sided with the former.³⁴

In the typical corporate ATS case, an alien or group of aliens brings suit in U.S. Federal Court against a defendant corporation for either direct or complicit liability in any number of human rights violations, such as torture, murder, or even genocide. In *Sarei v. Rio Tinto, PLC*³⁵ and *Mujica v. Occidental Petroleum*,³⁶ for example, the defendant British/Australian and American corporations were alleged to have participated with the governments of Papua New Guinea and Colombia, respectively, in military actions aimed at protecting the corporate facilities and in which innocent civilians were harmed or killed.³⁷ Since foreign governments can escape judicial liability through the principle of sovereign immunity, the corporations remained the only potential (deep-pocketed) defendant. What is interesting about the adjudication of these cases, however, is that the merits of the alleged tortuous conduct and violations of international law are rarely at issue. Instead, because the defendant corporations want to avoid judgment on the merits, they seek dismissal through other means. Since *Sosa* found the ATS to be merely a jurisdictional statute,³⁸ defendants can escape liability if they can prove a court lacks proper jurisdiction over them. Enter then the political question doctrine.

B. *The Political Question Doctrine and United States Foreign Policy*

Like the Alien Tort Statute, the political question doctrine is a product of the Founding era. From the early nineteenth century, courts understood that some executive branch actions were nonjusticiable. Justice Marshall addressed the issue in *Marbury v. Madison*³⁹:

By the constitution of the United States, the President is invested with certain important political powers, in the

³⁴ See, e.g., Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZ. J. INT'L L. (2006) ("[T]he Bush Administration has vigorously opposed the use of complicity liability in Alien Tort Statute litigation. Actually, they vigorously opposed any use of the Alien Tort Statute whatsoever. They lost that issue before the Supreme Court two years ago in *Sosa v. Alvarez-Machain*. Now, they are attempting to do retail what they were unable to do wholesale, by attacking various aspects of the Alien Tort Statute . . .").

³⁵ 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

³⁶ 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

³⁷ See *Sarei*, 221 F. Supp. 2d at 1121-27.

³⁸ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004).

³⁹ 5 U.S. 137 (1803).

exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . In such cases, [these] acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political.

. . . .

But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.⁴⁰

While the opinion failed to clarify the limits of political subjects, it did establish the existence of a line beyond which judicial authority and judicial review could not intrude. Over the next century and a half, the issue arose mostly in domestic matters, though it was used to limit the judiciary's oversight of American westward expansion during the nineteenth century.⁴¹ For the most part, however, the doctrine was rarely invoked.

The Supreme Court revived the near-dormant doctrine in *Baker v. Carr*,⁴² in which it sought to address the confusion and inherent ambiguity of what constitutes a political question. The *Baker* Court, in a decision written by Justice Brennan, created the now-famous six-factor test to be used in discerning whether a matter should remain solely with the political branches' domain. Under the test, a matter is nonjusticiable if it demonstrates:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the

⁴⁰ *Id.* at 165–66.

⁴¹ See Nada Mourtada-Sabbah & John W. Fox, *Two Centuries of Changing Political Questions in Cultural Context*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 91 (Nada Mourtada-Sabbah & Bruce E. Cain, eds. 2007).

⁴² 369 U.S. 186 (1962).

potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁴³

This factor-driven analysis was not just an attempt to add clarity to an inherently vague doctrine; more importantly, and some would argue, dangerously,⁴⁴ it made the doctrine more accessible to federal courts, which in turn may have diminished the power of the judicial branch with every case found to be nonjusticiable.⁴⁵ This is of some worry, since “lower courts have found issues to be political and nonjusticiable more often [in the years] since *Baker* than in all of our previous history.”⁴⁶

Baker and subsequent cases generally used the political question doctrine as it applied to domestic issues, such as voting or redistricting,⁴⁷ and left little in the way of guidance for courts addressing the doctrine as it related to foreign policymaking. In fact, *Baker*’s only contribution was a note in dicta stating that, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”⁴⁸ Though the Supreme Court briefly touched on the political question doctrine as it pertained to foreign affairs in *Goldwater v. Carter*⁴⁹—in which the court found judicial review inapplicable in a particular contest between the executive and legislative branches—, it has been left to lower courts to sort out the limits of justiciability in foreign affairs cases. Because of this lack of guidance, one commentator noted, “Foreign affairs is where the doctrine flourishes and where confusion about it is rampant.”⁵⁰

The principal question that lower courts have been tasked to answer is what constitutes a foreign policy decision. In some cases, the answer is quite obvious. In *Bancoult v. McNamara*, the D.C. Cir-

⁴³ *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (paraphrasing *Baker v. Carr*, 369 U.S. 186 (1962)).

⁴⁴ See Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1477 (2005) (“The Court has never determined . . . whether the political question doctrine is rooted in the Constitution or is simply a judicial construct that exists at the sufferance of the political branches.”).

⁴⁵ Choper notes, “if the Court concludes that the resolution of certain constitutional questions would be inconsistent with proper performance of its essential role in our system of government, then it should invalidate efforts by the political branches to require it to do so.” *Id.* at 1478. In other words, excessive political question rulings foreclose more than the adjudication of particular matters, but aggrandize the executive and legislative branches at the judiciary’s expense.

⁴⁶ LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 82 (1990).

⁴⁷ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

⁴⁸ *Baker*, 369 U.S. at 211.

⁴⁹ *Goldwater v. Carter*, 444 U.S. 996, 998–99 (1979).

⁵⁰ HENKIN, *supra* note 46, at 82.

cuit, in affirming a decision of nonjusticiability in a suit against the U.S. government relating to the deportation of aliens during the construction of a military base, found that “[t]he instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations. ‘Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.’”⁵¹ Similarly, in *Schneider v. Kissinger*, the court found that U.S. support for the Pinochet regime was also a nonjusticiable concern, and that nearly all six *Baker* factors applied to an executive policy decision to support a foreign regime.⁵² Notably, in both cases the U.S. government—or actually its officials acting in official capacity—was the defendant, and as such, the country’s policy decisions were indelibly linked to the named parties on trial.

In many ATS cases, however, the defendant is a third-party corporation whose actions are not immediately subject-matter excusable—hence the propensity to invoke a justiciability defense.⁵³ The political question doctrine thus provides an apparent path to dismissal.

C. *The Relationship Between the ATS and Political Question Doctrine*

Before moving on to a discussion of the actual methods by which the executive branch tries to influence the judiciary and the courts’ subsequent responses, it is necessary to look briefly at the relationships between the ATS and the political question doctrine. While the doctrine is not limited to this line of cases, its reemergence in the past decades has interestingly tracked that of the ATS. Moreover, in recent corporate ATS cases, the political question doctrine is consistently asserted as a jurisdictional defense, though until now with little success.

It is well established that the political question doctrine does not on its face require courts to dismiss ATS claims brought against corporations operating in politically sensitive areas.⁵⁴ In *Doe v. Exxon Mobil Corp.*, the D.C. Circuit, while avoiding ruling on the merits of

⁵¹ *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006) (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

⁵² *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 258–64 (D.D.C. 2004).

⁵³ See, e.g. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) (finding that “Plaintiffs here have alleged several claims asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination,” and that “Plaintiffs claims are thus not frivolous”). In the cases discussed herein, the issue is rarely over whether the alleged tortious conduct is in fact tortious—rather, justiciability dismissal is sought so that the cases do not have to be litigated on their merits.

⁵⁴ See *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354–55 (D.D.C. 2007).

the case, chose not to dismiss charges of human rights violations against Exxon Mobil, despite executive branch support for such a dismissal.⁵⁵ Other courts have held similarly, finding that a mere suggestion by the executive branch, usually in the form of State Department letter, that ATS litigation may interfere with U.S. foreign policy is not on its own sufficient to dismiss the case.⁵⁶ At the same time, courts never dismiss such executive statements out of hand, in part because they have no other means of obtaining information on the case's foreign-policy significance.

The Supreme Court has never directly weighed in on this issue; in fact it has only alluded to it once, in a footnote in *Sosa* noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."⁵⁷ Such dicta is merely persuasive, and courts today continue to follow *Kadic v. Karadzic*, in which the court held that "even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, [does] not necessarily preclude adjudication."⁵⁸ As a result, courts in ATS cases have ruled both ways, sometimes deferring to executive branch requests, and sometimes ignoring them. As will be discussed in Part IV, however, the decision to defer to or ignore the executive branch—or to rule on the existence of a political question—has become less a decision made through a *Baker* analysis, but rather an assessment of the government's argument delivered in its statement to the court.

II. THE INTERPLAY BETWEEN THE JUDICIARY AND THE EXECUTIVE IN CORPORATE ATS CASES

Though *Filartiga* reestablished in 1980 the ability to bring suit against foreigners in U.S. courts, the first ATS case against a corporate malfeasant was not brought until 1993. Although that case, *Aguinda v. Texaco*, was eventually dismissed on *forum non conveniens* grounds and transferred to Ecuador, it ushered in a new era in which gross corporate misconduct overseas might be found to be a justiciable cause of action.⁵⁹ Though *Sosa* later limited the causes of actions to only the most grave violations of international law,⁶⁰ it reaffirmed the

⁵⁵ *Id.* at 356.

⁵⁶ See, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205 (9th Cir. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, *3–7 (S.D.N.Y. 2005).

⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

⁵⁸ *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

⁵⁹ See *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001).

⁶⁰ See *Sosa*, 542 U.S. at 725 (holding that relevant international norms must be "of international character accepted by the civilized world").

Court's support for this class of litigation, angering both large multinationals and the countries in which they operate.

Naturally, the executive branch was not happy. Because the executive is tasked with managing the affairs of State, such lawsuits prompt other nations to express their concerns to the executive branch, which, in turn, seeks to limit the diplomatic fallout. While the State Department makes a sincere showing of its general support for human rights, it has, particularly under the second Bush administration, frequently qualified that support by advocating dismissal of these suits. Its usual argument is that these suits affect U.S. foreign relations, interfere with the executive's constitution foreign affairs powers, trigger the political question doctrine, and must be dismissed.⁶¹ Courts, understandably, have remained cautious.

A. Targeted Letters and Statements of Interest

The Ninth Circuit best summarized the importance of statements of interest in their *Sarei* decision: "We first observe that without the SOI [Statement of Interest], there would be little reason to dismiss this case on political question grounds, and therefore that the SOI must carry the primary burden of establishing a political question."⁶² Herein then lies the courts' major dilemma.

The typical corporate ATS case unfolds as follows: The defendant corporation seeks to dismiss on a number of jurisdictional grounds, such as the act of state doctrine, Foreign Sovereign Immunities Act, and political question doctrine.⁶³ In its attempt to analyze the political question defense, the court frequently turns to the executive branch, usually the State Department, to assess the foreign policy implications of the litigation, as the court on its own cannot necessarily make such a determination.⁶⁴ The State Department then sends its opinion directly to the court, either in the form of a letter or a longer statement of interest, and the court rules on the applicability of the political question doctrine.⁶⁵

While different branches of the U.S. government have frequently participated in the judicial process by filing amicus briefs, only recently have courts begun to make targeted backdoor inquiries to the executive branch through requested briefs or shorter statements of in-

⁶¹ See *infra* Part III and Appendix.

⁶² *Sarei v. RioTinto, PLC*, 487 F.3d 1193, 1206 (9th Cir. 2007).

⁶³ See, e.g. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) ("Caterpillar moved to dismiss the action. . . under the act of state and political question doctrines."); *Austria v. Altmann*, 541 U.S. 677, 681 (2004) (addressing the Foreign Sovereign Immunities Act).

⁶⁴ See, e.g., *Matar v. Dichter*, 500 F. Supp. 2d 284, 294 (S.D.N.Y. 2007).

⁶⁵ See *infra* Part III.

terest.⁶⁶ The second Bush administration generally took advantage of this influential power to a greater degree than previous administrations.⁶⁷ This was particularly true in Alien Tort Statute cases.⁶⁸

Under 28 U.S.C. § 517, officers of the Department of Justice, on their own or on behalf of other federal agencies, may attend to the interests of the U.S. government in any federal or state court.⁶⁹ The Supreme Court has affirmed the value of such submissions and extended the privilege to other federal agencies, noting that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁷⁰ In ATS cases, this generally takes on the form of a letter or statement of interest.⁷¹ The letter from State Department Legal Advisor William H. Taft in *Doe v. Exxon* provides a good example of the executive response to the court’s request:

This is in response to your letter . . . , in which you invite the views of the Department of State in connection with the above-captioned proceedings. Specifically, you inquire “whether the Department of State has an opinion (non-binding) as to whether adjudication of the case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact.” As you requested, this letter specifically addresses the potential adverse impacts of the litigation on U.S. interests. It does not address the legal issues before the court.

For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States⁷²

By making every attempt to steer clear of legal analysis, the letter continues on to describe the specific and more general reasons why adju-

⁶⁶ Baxter, *supra* note 16, at 812–14.

⁶⁷ *Id.* at 814.

⁶⁸ See, e.g. Hermer & Day, *supra* note 5 (analyzing the Bush Administration’s attempts to gut the Alien Tort Claims Act).

⁶⁹ 28 U.S.C. § 517 (2006) (“[A]ny officer of the Department of Justice . . . may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court . . .”).

⁷⁰ *Austria v. Altmann*, 541 U.S. 677, 702 (2004).

⁷¹ See, e.g. Baxter, *supra* note 16, at 811.

⁷² Exxon Statement of Interest, *supra* note 1, at 1.

dication might be detrimental to American interests overseas.⁷³ Such distinction is crucial. While the executive branch (or any third party) can submit an amicus brief and include legal arguments, these letters or statements of interests touch on only the factual relevance of the case as determined by the executive branch. This presents the court with an additional problem: How best should it assess the veracity of the government's claim? Because the political branches by nature must listen to their constituents⁷⁴—and because the executive must listen to its peer executives in other countries—there exists the inclination for the executive to bend the facts to suit its own policy and political decisions. While courts have not said this explicitly, their decision making on political-question justiciability must take this into consideration, because only the executive knows its own foreign policy (and is in the best position to assess foreign policy implications). Though some courts have decided to take professed foreign policy implications at face value,⁷⁵ others, particularly the circuit courts, have taken a firmer stand, noting that, “[u]ltimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.”⁷⁶

B. *How do Courts Treat Executive Statements in ATS Cases?*

Corporate ATS cases remain at the forefront of an ongoing separation of powers battle between the executive and the judiciary, a dispute exacerbated during the eight years of the Bush Administration.⁷⁷ One commentator labels these cases a “‘perfect storm’ of converging interests.”⁷⁸ He continues, “[t]he statements of interest play into several concerns of the [executive]: curtailing the ATS as a policy matter; expanding executive power; and, above all, protecting corporations from what the Administration views as unwarranted costs and litiga-

⁷³ *Id.* at 2–3.

⁷⁴ See Erwin Chemerinsky, *Who Should be the Authoritative Interpreter of the Constitution? Why There Should Not be a Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 188 (Nada Mourtada-Sabbah & Bruce E. Cain, eds. 2007) (noting that the “legislature and executive” are “less likely to uphold the Constitution when faced with intense reaction from their constituents”).

⁷⁵ See, e.g., *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *rev’d in part*, *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D. N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 283 (D. N.J. 1999).

⁷⁶ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205 (9th Cir. 2007).

⁷⁷ Baxter, *supra* note 16, at 811.

⁷⁸ *Id.* at 812.

tion risks.”⁷⁹ Yet because the executive is not asked to present its own legal analysis, and because it will not waste the court’s time by using its statements of interest to make policy arguments, the executive is limited to speculating on the factual implications of the ATS case at hand.

As such, the executive, through a State Department letter or statement of interest, may invoke one or more of the following claims:

- The present litigation could/will make it more difficult for U.S. firms to do business abroad, both in a particular country and in general.⁸⁰
- An alternative remedy or adjudication process has already been established.⁸¹
- The present litigation would damage U.S. relations with other countries.⁸²
- Adjudication would interfere with the war on terrorism.⁸³
- Adjudication would interfere with U.S. counter-narcotics efforts.⁸⁴
- The litigation could impact the Executive’s ability to manage a foreign peace process.⁸⁵

Yet because of the court’s limited fact-finding capabilities—and because the executive is in the best position to know what the potential foreign policy implications will be—the court, to some extent, has to take the State Department’s word. What the court does not have to do, and what it has proven it will not do, however, is accept speculation. As summarized by the D.C. District Court in *Beatty v. Republic of Iraq*: “[T]he deference due a statement filed by the Executive Branch *does* hinge in large part on the thoroughness of the statement and of the representations made therein, including whether the Executive supports dismissal of the suit and *on what grounds*.”⁸⁶ As the cases in

⁷⁹ *Id.*

⁸⁰ See, e.g., *In re South African Apartheid Litig.*, F. Supp. 2d 228, 276–77 (S.D.N.Y. 2009); *Exxon Mobil*, 473 F.3d 345, 364 (D.D.C. 2007).

⁸¹ See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 562 (9th Cir. 2005) (finding that, at least for some claims, the U.S. had already established a process for securing reparations stemming from holocaust-era property theft); *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001).

⁸² See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169 (C.D. Cal. 2005).

⁸³ See, e.g., *Mujica*, 381 F. Supp.2d at 1188.

⁸⁴ See, e.g., *id.* at 1188.

⁸⁵ See, e.g., *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007) (noting that the State Department argues the suit would interfere with the United States diplomatic effort in the Middle East).

⁸⁶ *Beatty v. Iraq*, 480 F. Supp. 2d 60, 79 (D.D.C. 2007) (emphasis added).

Part III and the discussion in Part IV reveal, courts focus particularly on the factual “grounds” and less on the prongs of the *Baker* analysis.⁸⁷

III. THE IMPACT OF EXECUTIVE STATEMENTS IN NINE MAJOR ATS CASES

This Part looks at the major recent ATS cases in which the political question doctrine was invoked; with one exception,⁸⁸ the executive branch sought to directly influence the court’s political question determination. The survey covers nine ATS cases, generally considered the most important in recent years. Eight of these cases were brought within the last decade and decided in the past five years. The lone exception, *Kadic v Karadzic*, is included because it provides a starting point from which the other cases emerge, and because it is one of the few in which the executive branch—in this case the Clinton Administration—explicitly stated that the political question doctrine did not apply.⁸⁹ All but two involve corporate defendants; the others, *Kadic* and *Matar v. Dichter*, are included also to demonstrate the extremes of ATS justiciability, and to bracket the more vague and uncertain corporate ATS cases.

⁸⁷ See *Developments in the Law*, *supra* note 16, at 1196 (“The courts that have expanded the political question doctrine have done so nominally within the bounds of Baker’s categories, particularly favoring the last three. However, they have looked to these categories almost as an afterthought; in each of the decisions presented below, the real actuating force was a State Department determination that the suit in question should not proceed. Naturally, this has yielded awkward fits between fact and doctrine, as the Baker inquiry is dramatically relaxed to accommodate the deference granted to the executive branch.”) (citations omitted).

⁸⁸ The defendant in *Corrie v. Caterpillar* sought to have the court solicit a State Department letter, but the court refused. See *Corrie v. Caterpillar, Inc.*, 503 F. 3d 974, 978 n. 3 (9th Cir. 2007) (“Caterpillar moved for the district court to solicit the State Department’s views, but the district court dismissed plaintiff’s claims without ever ruling on that motion. Had the United States filed a Statement of Interest, we would have given it ‘serious weight.’”).

⁸⁹ This of course raises the issue of how courts should respond when the executive branch says that the political question doctrine should not apply in a given case. On one hand, a political question analysis is inherently legal, and thus the administration should not offer its legal analysis, at least at the trial level. On the other hand, if the executive branch explicitly states that it has no interest in a matter, it would appear as if the matter is left to the judiciary. I could find no case where the courts have ruled for the existence of a political question over the objections of the political branch, though there is no technical reason why such a case could not arise.

A. *Method of Analysis*

To determine (a) how the executive crafts its political question argument, (b) how the courts address and respond to executive assertions, and, most importantly, (c) what, if any, common method of analysis has emerged from the courts' decision making, it is necessary to read the ATS cases with a particular focus on the language used by both the executive branch (State Department) and the adjudicating courts. This Part then focuses on the respective language (while the next Part analyzes the courts' methodology) by looking at three political question doctrine related elements of the major ATS cases: State Department language, the rationale for justiciability/nonjusticiability, and the courts' holdings.

State Department Language. The language in the State Department statements of interests is important for two reasons. First, it reveals the executive branch's assessment of potential foreign policy implications of the pending litigation. Second, and more importantly, it reveals the degree of certainty with which the State Department believes that the litigation will have its projected effects. The *Sarei* court noted this fact, explaining that "without the [statement of interest], there would be little reason to dismiss this case on political question grounds, and therefore . . . the SOI must carry the primary burden of establishing a political question."⁹⁰ The courts rely to a significant degree on the persuasive languages within these letters and particularly look to the executive's certainty (or uncertainty) on the potential foreign policy implications. As the D.C. Circuit noted, much of the State Department's assessment is "necessarily predictive and contingent on how the case might unfold."⁹¹ The cases establish this point, as statement of interest language indicating the degree of State Department assuredness becomes a central part of the courts' political question analysis.

Rationale for Justiciability/Nonjusticiability. While the exact rationale in the executive branch arguments for the applicability of the political question doctrine is of secondary concern—the courts rarely distinguish one rationale from another in terms of importance or need for deference—it does provide interesting commentary on the degree to which the executive may stretch the foreign policy connection. For example, the State Department's contention in *Mujica* and *In re South African Apartheid Litigation* that such lawsuits would have a "chilling

⁹⁰ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1206 (9th Cir. 2007).

⁹¹ *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.D.C. 2007) (quoting Exxon Statement of Interest, *supra* note 1).

effect on doing . . . business”⁹² reveals the inherent mushiness of such pronouncements. After all, what lawsuit that had the potential to anger a foreign government might not potentially affect U.S. business interests?

Courts’ Holdings. The courts’ holdings and reasonings naturally provide the keys to determining the standard by which they make their political question decisions. As the opinions reveal, courts, while generally addressing the *Baker* factors, fixate on the language and definitiveness of the State Department letters and statements of interest. The opinions also reveal the limits on what arguments the courts will accept—they will not, for example, give weight to executive branch legal interpretations,⁹³ nor do they accept that cases with foreign affairs or international human rights implications are per se nonjusticiable.⁹⁴

B. The Major Recent ATS Cases

The following table briefly breaks down nine major ATS cases from recent years through the above-mentioned criteria. A more detailed analysis, including the appropriate excerpts of the letters and court opinions (and with full citations), is presented in the Appendix.

TABLE: SUMMARY OF NINE MAJOR ATS CASES⁹⁵

Case	Executive Branch Concerns	Nonjusticiability Argument	Court’s Holding and Discussion
<i>Kadic v. Karadzic</i>	None. Executive argues that political question doctrine (PQD) should not apply.	N/A	Justiciable. Court notes that while Executive Branch (EB) opinion is relevant, it is not binding.
<i>Mujica v. Occidental Petroleum</i>	Adjudication will have adverse foreign policy consequences.	Effect on bilateral trade and relations with Colombia.	Nonjusticiable. Adjudication interferes with EB’s approach to managing this issue. ⁹⁶

⁹² *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 284 (S.D.N.Y. 2009); see also Mujica Statement of Interest, *supra* note 2 (“Lawsuits such as the one before Judge Rea have the potential for deterring present and future U.S. investment in Colombia”).

⁹³ See *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7, 69 (E.D.N.Y. 2005) (“The judiciary is the branch of government to which claims based on international law has been committed.”).

⁹⁴ *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

⁹⁵ See *infra* Appendix (providing citations and detailed explanations of cases, important language, and holdings).

⁹⁶ Note that although the court found that the political question doctrine *did* apply, it based its ruling in part on a lower court’s decision in *Sarei*, which has since been overturned. See discussion *infra* note 100 and accompanying text.

<i>In Re Agent Orange</i>	Adjudication is essentially a challenge to EB's war-prosecution powers.	President's war-fighting powers let EB make determination about legality of certain tools/weapons.	Justiciable. An assessment of the proper role of the courts in overseeing the president's actions, even if those actions are nominally within EB's powers.
<i>Presbyterian Church of Sudan v. Talisman</i>	Canada protested the case (against a Canadian corporation), and EB agreed.	International comity and preservation of relations between the U.S. and the government of Canada.	Justiciable. Nexus between the adjudication of the lawsuit and EB's foreign policy concerns was too vague.
<i>Doe v. Exxon Mobil</i>	" . . . [I]t is the [EB]'s considered opinion that adjudication at this time <i>could</i> adversely affect [U.S.] interest."	Effect on bilateral trade and anti-terrorism cooperation with Indonesia; chilling effect on foreign direct investment.	Justiciable. Because the Department of State was not completely sure that the suit would infringe on EB's foreign policy-making capabilities, it could not apply the PQD.
<i>Sarei v. Rio Tinto</i>	In the DOS's judgment, adjudication would risk threatening a Papua New Guinea peace process.	Interference with the internal domestic affairs of an American ally.	Justiciable. Even though EB wanted the case to disappear, the DOS did not explicitly request dismissal on PQD grounds.
<i>Matar v. Dichter</i>	Adjudication would undermine EB's ability to manage the Israeli-Palestinian peace process.	Threatens both the management of the peace process, and the process itself.	Nonjusticiable. Here, the DOS explicitly requested dismissal both as necessary and on PQD grounds.
<i>Corrie v. Caterpillar</i>	N/A. Though defendant requested that the court solicit a DOS letter, the court refused.	N/A	Nonjusticiable. Because tort in question resulted from foreign aid (EB domain), the matter was a political question.
<i>In re South African Apartheid Litig.</i>	Adjudication would compromise U.S. investment in South Africa, which is an EB foreign policy tool.	Interference with bilateral relations with South Africa; chilling effect on business.	Justiciable. The assertion that adjudication would have a chilling effect on business is speculative at best.

While all of these cases discuss the political question doctrine and thus help shape its jurisprudence in ATS cases, seven—*Mujica*, *Agent Orange*, *Talisman*, *Exxon Mobil*, *Sarei*, *Corrie* and *South African Apartheid*—involve corporate defendants. While other cases, such as *Wiwa v. Royal Dutch Petroleum*⁹⁷ and *Saleh v. Titan*,⁹⁸ have been brought against corporate defendants, these seven remain the only to

⁹⁷ 226 F.3d 88 (2d Cir. 2000) (finding there to be jurisdiction in the case brought by Nigerians against the petroleum company, but dismissing on *forum non conveniens* grounds).

(a) provide political question analysis, (b) address or rely on evidence provided by the executive branch through a State Department letter, and (c) have a corporate defendant. Though the case law is then necessarily thin, the opinions share enough in common in their analyses to provide clues on how courts will likely continue to adjudicate these claims.⁹⁹

Five of these remaining seven cases were found to be justiciable. One of the outliers, *Mujica v. Occidental Petroleum*, has since been essentially overruled as it relies on previous incarnation of *Sarei* that was recently overturned by the Ninth Circuit.¹⁰⁰ The other, *Corrie v. Caterpillar*, is the only case in which a statement of interest was not submitted. As the next Part demonstrates, the remaining cases rely on a similar analysis; they also provide evidence of a break from the previous *Baker v. Carr* analysis and chart a new method of adjudicating these claims.

IV. THE EMERGENCE OF A NEW, DEFERENCE-BASED ANALYSIS

The previous nine cases, along with a few others mentioned briefly throughout, are by no means the only important ATS cases, nor do they provide definitive rules that necessarily bind future courts. Moreover, all nine cases fall within the Second, Ninth, or D.C. Circuits, and thus, because the Supreme Court has yet to refine the ATS and define levels of political question deference beyond its work in *Baker* and *Sosa*, merely have persuasive effect outside their respective jurisdictions.¹⁰¹

This said, it remains helpful to compare the similar reasoning among the different courts to construct a single lens through which they all analyze these cases. Because of the relative paucity of corporate ATS cases, particularly those in which the executive has weighed in through a State Department letter or statement of interest, the aforementioned cases are all with which commentators have to work.

⁹⁸ 436 F. Supp. 2d 55 (D.D.C. 2006) (finding no ATS jurisdiction over allegations of human rights violations brought by Iraqi citizens against U.S. government contractors).

⁹⁹ See *infra* Part IV.

¹⁰⁰ See generally *Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007). In *Mujica*, the court, in ruling the claim to be nonjusticiable, cited to *Sarei* and explained: "In other cases, courts have restricted claims of crimes against humanity to more limited circumstances." *Mujica*, 381 F. Supp. 2d at 1183. As discussed, the district court ruling in *Sarei* has since been overturned by the Ninth Circuit.

¹⁰¹ Because these three circuits are likely to deal with the vast majority of these cases in the future.

As such, an analysis combining the ideas and reasoning from these different circuits remains appropriate at this time.

This Part discusses the new emerging consensus among courts on how to decide the political question issue in corporate ATS cases. First, it lays out the political question boundaries by looking at cases where the court clearly decides that political questions do and do not exist. It then shows how the courts have abandoned the *Baker* framework in favor of a new, more subjective dereference-based approach. Finally, it explains how despite the appearance of increased deference to the executive branch in these cases, courts have managed to maintain their authority and review.

A. *The Limits of Political Questions in ATS Cases*

Two cases, *Kadic v. Karadzic* and *Corrie v. Caterpillar*, demonstrate the outer boundaries of courts' willingness to adjudicate claims brought under the ATS. In *Kadic*, a 1995 case brought by Bosnian Muslim and Croat victims of atrocities committed by Bosnia Serb forces under control of the defendant Radovan Karadzic, the de facto though non-internationally recognized head of the Bosnian Serb republic,¹⁰² the court not only built on *Filartiga* and set the course for future ATS litigation, but also implied that when the executive branch does not see the litigation interfering with a matter under its sole purview, a nonjusticiable political question does not exist.¹⁰³ In this case, the State Department explicitly noted that "dismissal of [the case] under the 'political question' doctrine is not warranted," implying that

¹⁰² See *Kadic v. Karadzic*, 70 F.3d 236 (2d Cir. 1995). The court even remarked on the claim's novelty, alluding to the historic nature of their opinion:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, which recognized the important principle that the venerable Alien Tort Act, enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.

Id.

¹⁰³ *Id.* at 250 ("In a 'Statement of Interest,' . . . the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reinforces our view that adjudication may properly proceed.").

adjudication did not infringe on its foreign policy making abilities.¹⁰⁴ The court agreed. *Kadic* thus demarcates the end of the spectrum at which a political question does not exist.

While *Kadic* brackets one end of ATS political question cases, *Corrie v. Caterpillar* brackets the other. In this case, brought on behalf of Palestinian civilians and an American peace activist killed in Gaza by an Israeli bulldozer, the plaintiffs brought suit against the bulldozer's manufacturer claiming that the corporation "knew or should have known that the bulldozers it was supplying to [Israel] would be used to commit violations of [international law]."¹⁰⁵ While the Israeli army committed the acts, the act of state doctrine and doctrine of sovereign immunity prevented suit against Israeli officials. Caterpillar Corporation, which manufactured the bulldozers, proved then to be the only potential litigation target.

Though the district court ruled (on the merits) that Caterpillar's actions did not violate international law,¹⁰⁶ the Ninth Circuit, on appeal, clarified the political question implications. Following its previous decision in *Alperin v. Vatican National Bank*,¹⁰⁷ the *Corrie* court reaffirmed the notion that pure foreign policy decisions should be left to the elected branches. Because in this case the U.S. government had purchased the bulldozers and given them to Israel—a decision made by the executive branch pursuant to its foreign affairs powers—Caterpillar's sale was subsumed into a concrete U.S. policy decision, and not justiciable. Simply put, actions performed directly and unambiguously within a constitutionally derived power are not matters for the court. As in this case, "[a] court could not find in favor of the plaintiffs with-

¹⁰⁴ U.S. State Department Statement of Interest, *Kadic v. Karadzic*, Sep. 13, 1995 [hereinafter *Kadic* Statement of Interest]. An interesting aside is the catch twenty-two that a statement by the executive that the political question doctrine does not apply is not really a legal argument, but a statement on the litigation not affecting the executive's ability to conduct foreign policy. Conversely, an argument that the political question doctrine should apply is an inherently legal argument, which the courts are loath to accept. Thus, it would seem that there could never be a case where the executive argues that there is no political question but is overruled by the court. A discussion of this dilemma, however, is beyond the scope of this article.

¹⁰⁵ *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1023 (W.D. Wash. 2005).

¹⁰⁶ *Id.* at 1028–29.

¹⁰⁷ 410 F.3d 532, 559 (9th Cir. 2005). *Alperin* reaffirmed the idea that "cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (quoting *Alperin*, 410 F.3d at 559).

out implicitly questioning, and even condemning, United States foreign policy toward Israel.”¹⁰⁸

B. Courts Have Abandoned Baker in Corporate ATS Cases

While *Kadic* and *Corrie* delineate the boundaries of political questions in ATS cases, the courts in those cases also provide insight into how courts are moving away from the six-factor test created by the Supreme Court in *Baker v. Carr*. Both courts spend little time looking at the *Baker* factors, but rather divide them into two groups: the first three *Baker* factors,¹⁰⁹ which are reduced to the question of whether the matter before the court is a violation of international law,¹¹⁰ and the last three *Baker* factors,¹¹¹ which are really three separate ways of asking the question of whether adjudication infringes on the executive’s ability to conduct the nation’s foreign affairs.¹¹² The *Corrie* court, reiterating the opinion in *Alperin*, observed that “[the *Baker* tests] are more discrete in theory than in practice, with the analyses often collapsing into one another.”¹¹³ This reduction essentially obviates the need to address each *Baker* factor, and leads in these cases to a de facto creation of two questions: (1) is the claim based on a violation of international law, and (2) does adjudication of the claim unconstitutionally intrude on the executive’s foreign policy-making powers and abilities? The first question provides a baseline

¹⁰⁸ *Corrie*, 503 F.3d at 984. A similar holding resulted in *Matar v. Dichter*, where a New York District Court found a suit against the Israeli government, predicated on issues similar to that in *Corrie*, was nonjusticiable on political-question grounds. The *Matar* court found that a suit against the Israeli government would “impede the Executive’s diplomatic efforts” at resolving the Israeli-Palestinian crisis. *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007).

¹⁰⁹ *Baker v. Carr*, 369 U.S. 186, 217 (1962). The first three *Baker* factors are: “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. . . .” *Id.*

¹¹⁰ See *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (“[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the [ATCA], which obviates the need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.”).

¹¹¹ *Baker*, 369 U.S. at 217. The last three *Baker* factors are, “[4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. . . .” *Id.*

¹¹² See *Corrie*, 503 F.3d at 983.

¹¹³ *Id.* (quoting *Alperin*, 410 F.3d at 544).

jurisdictional hoop, while the second requires a deeper level of inquiry, and is where the executive branch's letters and statements of interest matter most.

Presbyterian Church of Sudan v. Talisman Energy, Inc. provides an example of this new analysis. In this case, brought by Sudanese villagers against a Canadian oil company for aiding the Sudanese government in the commission of "genocide, crimes against humanity, and other violations of international law,"¹¹⁴ the court noted that the "plaintiffs seek a tort remedy under the ATCA for gross human rights violations," and that "universally recognized norms of international law are also present in the instant case."¹¹⁵ This was a "first question" ruling that the matter involved serious violations of international law. The court, in a follow-up opinion dedicated solely to answering the second question, then found, after scrutinizing the State Department's letter and the potential implications of the lawsuit, that "Talisman is . . . at pains to identify United States foreign policies towards Sudan with which this action interferes" and that the case will not have an "impact on United States foreign policy towards Sudan or Canada."¹¹⁶ In this last calculation, the court did not discuss, apply, or even mention the *Baker* factors.

Likewise, in *Sarei v. Rio Tinto*, a case with facts similar to those in *Talisman*, the Ninth Circuit ruled similarly, breaking *Baker* into two lines of inquiry. It addressed and disposed of the first question by noting, "[g]iven that plaintiffs have properly alleged cognizable ATCA claims, it is not tenable to insist that the claims themselves are not entrusted to the judiciary."¹¹⁷ Regarding the second question, the court followed the Second Circuit, explaining that "[t]he fourth, fifth and sixth *Baker* factors are relevant in an ATCA case 'if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.'"¹¹⁸ The court then ruled, without performing a separate analysis for each factor, that adjudication does not unconstitutionally infringe on the executive's domain, despite the State Department's letter indicating that litigation "would risk a potentially serious adverse impact on . . . the conduct of our foreign relations."¹¹⁹ Instead, the court noted, "To de-

¹¹⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 at *1 (S.D.N.Y. 2005).

¹¹⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 348 (S.D.N.Y. 2003).

¹¹⁶ *Talisman*, 2005 WL 2082846 at *8 (S.D.N.Y. 2005).

¹¹⁷ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1204 (9th Cir. 2007).

¹¹⁸ *Id.* (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

¹¹⁹ *Sarei Statement of Interest*, *supra* note 3, at 2; *Sarei v. Rio Tinto PLC*, No. 2:00CV11695 (C.D. Cal. Nov. 5, 2001) (emphasis added).

termine whether [the final three *Baker*] factors are present, we must first decide how much weight to give the State Department's statement of interest."¹²⁰ As the next section demonstrates, courts have created a process to do this.

C. A New Two-Step, Deference-Based Approach

In ATS cases, the first of these two questions is generally quite easy. As the court in *South African Apartheid Litigation* noted, "The first three *Baker* factors will almost never apply in ATCA suits, which are committed to the judiciary by statute and utilize standards set by universally recognized norms of customary international law."¹²¹ As such, the cases generally come down to the second, more difficult question.

The judicial attempt to answer this second question—whether adjudication on the matter unconstitutionally affects the executive's foreign policy-making abilities—frequently comes down to the letter or statement of interest. The D.C. Circuit, in a dissenting opinion in *Doe v. Exxon Mobil Corp.* to which the majority explicitly notes its agreement,¹²² explained the problem:

Courts are not well-equipped to determine on their own . . . whether a particular civil case would have a negative impact on U.S. foreign policy and should be dismissed. In part for that reason, as the Supreme Court has instructed, courts give deference to the Executive Branch when the Executive reasonably explains that adjudication of a particular civil lawsuit would adversely affect the foreign policy interests of the United States.¹²³

The key language is "reasonably explains," which goes to the degree to which the adjudication affects U.S. foreign policy-making, and establishes whether courts find the existence of a political question. The majority opinion noted as much, implying that a key to interpreting an executive letter or statement of interest in these cases involves "the

¹²⁰ *Sarei*, 487 F.3d at 1204; see also Michael J. O'Donnell, Note, *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts*, 24 B.C. THIRD WORLD L.J. 223 (2004); Thomas R. Sutcliffe, Note, "The Nile Reconstituted": *Executive Statements, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295 (2009).

¹²¹ *In re South African Apartheid Litig.* 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹²² *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 356 (D.D.C. 2007) ("[W]e note that we have entered no holding inconsistent with our dissenting colleague's doctrinal views on deference owed the executive in matters of foreign policy.").

¹²³ *Id.* at 360 (Kavanaugh, J., dissenting).

nature, extent, and intrusiveness of discovery” as pronounced by the State Department.¹²⁴

The issue of whether the courts have adopted this deference-based approach is uncontested. In all of these cases—*Exxon*, *Sarei*, *Talisman*, *South African Apartheid Litigation*, among others—the courts unquestionably defer to the State Department’s interpretation of the case’s potential foreign policymaking effects. Five courts explicitly follow the Second Circuit’s decision in *Kadic* to give statements of interest “serious weight.”¹²⁵ Yet at the same time, and despite express State Department support for dismissal, the courts, with one now pre-empted exception (*Mujica*), refused to rule the claims nonjusticiable. Instead, although they did defer to the executive’s opinions, the courts managed to create *degrees* of deference, instead of following the executive outright.

To determine the degree of deference to be given to executive statements of interests in corporate ATS cases, courts have begun using the State Department’s degree of certainty as a proxy for amount of deference due. The D.C. Circuit began such analysis with a baseline standard: “[W]e need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question.”¹²⁶ While such a pronouncement appears to give the executive undue deference—the political question doctrine requires a legal determination, a decision constitutionally granted to the judiciary—it can be interpreted as granting deference only when the State Department explicitly finds that a case will *indisputably* affect U.S. foreign policy-making abilities. The court in *South African Apartheid* held as such, explaining that it will give serious consideration to the executive’s views only with regard to the case’s “impact on foreign policy,” but that “deference does not mean delegation; the views of the Executive Branch—even where deference is due—are but one factor to consider and are not dispositive.”¹²⁷

¹²⁴ *Id.* at 356 (majority opinion).

¹²⁵ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205 (9th Cir. 2007) (“[W]e will give the view in the SOI ‘serious weight.’”); *Exxon Mobil*, 473 F.3d at 354; *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (noting as such despite the court not having solicited a State Department letter); *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 280; *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1177 (C.D. Cal. 2005).

¹²⁶ *Exxon Mobil*, 473 F.3d at 354. This follows the reasoning discussed in relation to *Kadic v. Karadzic*, in which certainty that an adjudication does not affect the executive’s foreign policymaking abilities results in the court understandably agreeing with (or deferring to) the executive. See discussion *supra* notes 102–03 and accompanying text.

¹²⁷ *In re South African Apartheid Litig.*, F. Supp. 2d 228, 281 (S.D.N.Y. 2009).

Yet the State Department is only so prescient, and can rarely know with certainty exactly how a case may or will affect U.S. foreign policy-making. Consequently, courts have fixated on statement-of-interest language indicating ambiguity, and inversely decreased their level of deference as the level of State Department ambiguity increases:

- In *Talisman*, the court refused to rule the suit nonjusticiable, finding that “neither the Statement nor the State Letter contend that this lawsuit *will* threaten or interfere with U.S. foreign policy . . . , [nor] that this lawsuit *is* frustrating or *will* frustrate United States foreign policy towards Canada. Therefore, nothing in the Statement necessitates revisiting this issue.”¹²⁸

- In *Sarei*, the Ninth Circuit overturned a lower court decision and pointed to the statement of interest’s “guarded nature” and its “nonspecific invocations of risks to the [Papua New-Guinea] peace process” in finding the case justiciable.¹²⁹

- In *Exxon Mobil*, the D.C. Circuit, in finding that the political question doctrine did not apply, found that the State Department letter “contained several important qualifications . . . [,] noted that the effects of this suit on U.S. foreign policy interests ‘cannot be determined with certainty’ . . . [, and] emphasized that whether this case would adversely affect U.S. foreign policy *depends* upon ‘the nature, extent, and intrusiveness of discovery.’”¹³⁰ Furthermore, the court noted that “given the letter before us in the record, we cannot say it is ‘indisputable’ that the district court erroneously failed to dismiss the plaintiffs’ claims under the political question doctrine, no matter what level of deference is owed to the State Department’s letter.”¹³¹

- In *In re South African Apartheid Litigation*, the Southern District of New York found claims against businesses accused of aiding the South African apartheid government not barred by the political question doctrine, and the State Department’s letter to the court unpersuasive.¹³² The court held that that “the Executive Branch’s views will not prevail if they are ‘presented in a largely vague and speculative manner’ or if the Executive’s concerns are not ‘severe enough or raised with the

¹²⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at *8 (S.D.N.Y. Aug. 30, 2005) (emphasis added).

¹²⁹ *Sarei*, 487 F.3d at 1206.

¹³⁰ *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.D.C. 2007).

¹³¹ *Id.*

¹³² *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 284.

level of specificity required to justify . . . a dismissal on foreign policy grounds.’”¹³³

- In *Mujica*, on the other hand, the court *found* the existence of nonjusticiable political questions, and, relying on “the U.S. State Department’s Supplemental Statement of Interest, [found that] allowing Plaintiffs to pursue these state law claims *would* interfere with several of its foreign policy goals.”¹³⁴ Key to its decision was the certainty that the case “would interfere” with current U.S. relations with Colombia, in which the alleged violations of international law had occurred.¹³⁵ However, two important points regarding *Mujica* must be raised. First, the court found none of the first three *Baker* factors to exist, thus finding an adjudicable matter of law.¹³⁶ Second, and most importantly, the opinion relied to a good extent on the district court’s political-question holding in *Sarei*,¹³⁷ which has since been overturned on appeal.¹³⁸

Such analysis indicates a clear trend in the courts’ deference to these letters and statements. Although the cases generally discuss some of the *Baker* factors—quickly passing on the first three and then aggregating the final three—the ultimate justiciability decisions in these corporate ATS cases depend on the clarity, specificity, and perceived accuracy of the State Department in its letters and statements of interest.¹³⁹ In finding any modicum of State Department doubt or uncertainty to immediately prevent the application of a political question, the courts have thus far refused to cede review.¹⁴⁰ The courts’ decision to look at the actual words of the statement of interest indicates that they are doing their job by adhering to its constitutional power of review instead of acceding to the growing power of the executive branch. Whether this was a response to Bush administration executive aggrandizement or merely a logical means of interpreting an inherently murky doctrine, the courts demonstrated their willingness to bend a doctrine to ensure a workable means of adjudication.¹⁴¹

¹³³ *Id.* at 282.

¹³⁴ *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1188 (C.D. Cal. 2005) (emphasis added).

¹³⁵ *Id.*

¹³⁶ *Id.* at 1195.

¹³⁷ *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *rev’d in part*, *Sarei*, 456 F.3d 1069.

¹³⁸ See *supra* note 100 and accompanying text.

¹³⁹ See *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007).

¹⁴⁰ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1206 (9th Cir. 2007).

¹⁴¹ See *Belgrade v. Sidex Int’l Furniture Corp.*, 2 F. Supp. 2d 407, 416 (S.D.N.Y. 1998).

Contrary to the fears of some commentators,¹⁴² courts have apparently managed to prevent the executive from completely chiseling away at the ATS and unconstitutionally intruding into the judiciary's domain.

Yet there remains some concern, not only because of the limited case law, but also because this new deference-based approach provides the executive branch with clear instructions on how to ensure nonjusticiability. All the State Department would have to do, it seems, is provide the court with definitive proof—or perhaps merely a very high degree of certainty—that a future ATS adjudication will negatively impact some aspect of U.S. foreign policy.¹⁴³ While the Obama administration will likely take a softer stance toward the ATS than the Bush administration—evident in President Obama's nomination of Harold Koh, a proponent of both international law¹⁴⁴ and what he calls “transnational public law litigation”¹⁴⁵—both it and future administrations will likely be caught between foreign policy obligations and American courts. Although courts have so far established a workable means to restrict executive involvement, such a détente may not ultimately last.

V. THE NEXT STEP: WHY COURTS MUST HOLD THE LINE, AND HOW THEY CAN DO SO

Thus far, this article has attempted to demonstrate that in corporate ATS cases courts have moved beyond the *Baker* analysis to a two-question approach. It has only speculated on why this new approach has taken hold. Dismissals of executive branch arguments can be interpreted as either a response to executive branch overreach, or as judicial support for an expanded (or non-diminished) ATS, or both. Given the reluctance of federal judges to engage in policy discussions,

¹⁴² See, e.g., Baxter, *supra* note 16, at 808 (“Through submission of State Department statements of interest in [ATS] cases, the Bush Administration now routinely intervenes in litigation brought to vindicate serious human rights abuses by seeking dismissal on behalf of powerful corporate defendants.”).

¹⁴³ See *Matar*, 500 F. Supp. 2d. at 295–96.

¹⁴⁴ See Ronald Slye, *International Law Exists – Which is Why We Need Harold Koh*, FOREIGN POLICY, Apr. 20, 2009, http://experts.foreignpolicy.com/posts/2009/04/20/international_law_exists_which_is_why_we_need_harold_koh (last visited Oct. 13, 2009).

¹⁴⁵ Harold Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2398 (1991) (“In short, even functioning largely as an adjunct to the traditional model of dispute-resolution, the model of transnational public law litigation can play an enormously useful role in providing relief for individuals, even as it spurs the recognition of developing global norms.”).

it would appear that for courts, the separation of powers concern is of prime importance.¹⁴⁶

This final Part looks at the new aforementioned two-question up-or-down adjudication, focusing particularly on two separation of powers concerns. First, it argues that courts must prevent executive branch aggrandizement by refusing to allow the executive to make decisions for them, even if the executive is in the best position to assess potential foreign policy-making implications.¹⁴⁷ Second, although the executive has the best ability to assess potential ramifications of corporate ATS adjudication, courts are in the best position to make unbiased political question calculations, and must thus continue to refrain from accepting wholeheartedly the executive's conclusions. Courts exist for a reason, and are vested with the tools and independence to make legal determinations;¹⁴⁸ as such, they should be given the resources needed to properly *weigh* issues. This Part concludes with a discussion of how this could feasibly occur.

A. Separation of Powers Concerns

1. Preventing Executive Branch Aggrandizement

It is well accepted that the President (and to a lesser extent the Congress) coordinates and executes the nation's foreign policy.¹⁴⁹ The Second and Ninth Circuits, where nearly all of the corporate ATS

¹⁴⁶ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). (“[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches”). But see *id.* at 733 n.21 (conditioning this approach by affording only “case-specific deference to the political branches”).

¹⁴⁷ The Court has, of course, held that there are times when deference is required. See, e.g., *Reagan v. Wald*, 468 U.S. 222, 223 (1984) (finding the executive best suited to determine the necessity of economic and travel restrictions with Cuba); *Zemel v. Rusk*, 381 U.S. 1, 1 (1965) (holding that the Secretary of State had the authority to impose travel restrictions).

¹⁴⁸ Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L. J. 1230, 1233 (2007) (arguing that excessive deference to executive branch interpretations would “radically expand the authority of the executive to interpret and, in effect, to break foreign relations law.”). But see Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1177 (2007) (“[C]ourts should play a smaller role than they currently do in interpreting statutes that touch on foreign relations [and] that the executive branch should be given greater power than it currently has to decide whether the United States will violate international law”).

¹⁴⁹ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“[The President] manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.”); THE FEDERALIST NO. 84

cases fall, understand this and accordingly have in general accepted executive branch interpretations of foreign policy matters under consideration. For example, in *Taiwan v. United States District Court* and *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*, the Ninth Circuit accepted executive interpretations regarding the political status of Taiwan, stating that the United States' position was "entitled to substantial deference in light of the primacy of the Executive in the conduct of foreign relations and the Executive Branch's lead role in foreign policy"¹⁵⁰ Likewise, in *Mora v. New York*, a non-corporate ATS case, the Second Circuit accepted State and Justice Department determinations that the failure to provide an arrested alien with certain consular rights was not a violation of customary international law (though it also noted that such agency determinations are "not conclusive").¹⁵¹ In matters requiring a foreign policy determination—such as whether a certain country falls within the jurisdiction of a treaty, or whether travel bans to a particular part of the world are valid—courts understandably defer to the executive, as most foreign policy decisions are in fact political questions that themselves cannot be adjudicated by the judiciary.¹⁵²

That deference, however, is distinguishable from the deference sought by the executive in corporate ATS cases. What the executive seeks in ATS cases is not respect for constitutionally sanctioned executive foreign affairs policy-making,¹⁵³ but a wholesale transfer of legal adjudication from the judiciary to the executive, or what one commentator sees as "turning 'respectful deference' into uncritical deference."¹⁵⁴ In cases like *Taiwan*, *Mingtai*, and *Mora*, the courts' deference had little to do with adjudication, but rather was predicated

("Even the management of foreign negotiations will naturally devolve upon [the President]").

¹⁵⁰ *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1147 (9th Cir. 1999) (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972)); *Taiwan v. United States District Court*, 128 F.3d 712, 718 (9th Cir. 1997) (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972)).

¹⁵¹ *Mora v. New York*, 524 F.3d 183, 204–08 (2d Cir. 2008) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982)).

¹⁵² See *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (finding the president's decision to suspend a treaty to be within his constitutional purview, and thus not adjudicable).

¹⁵³ Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Law-making*, 54 UCLA L. REV. 309, 353 (2006) ("Specifically, the principle that the national government has exclusive control over foreign affairs does not mean that the president alone can exercise all national powers that may touch on the field.").

¹⁵⁴ Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 201 (2004).

on deference to an executive interpretation of a matter of foreign policy integral to the merits of the case. Similarly, in cases like *Bancoult v. McNamara*, in which the legitimacy of executive branch decisions—in this case, the U.S. decision to deport a group of Indian Ocean islanders to make way for a military base—was itself on trial, courts generally find that the action falls squarely within the domain of the executive, and is thus nonjusticiable.¹⁵⁵ In ATS cases—in fact in all cases involving individual liberties¹⁵⁶—particularly in those corporate ATS cases discussed herein, no executive action or executive interpretation of a foreign policy matter are of any concern. Rather, in these cases, though its foreign policy concerns are no doubt real, the executive should at most be able to voice its concerns, not expect the courts to defer to its judgment. Anything more would be unjust—and unconstitutional—judicial deference to the executive branch.¹⁵⁷

2. *Only the Judiciary can Adjudicate Matters of Law*

The political question doctrine, especially as analyzed by the courts in the ATS cases discussed in this article, is unique in that while applying the doctrine is a matter of law, doing so requires the court to make a factual determination; namely, does the case unreasonably affect the executive's ability to conduct the nation's foreign affairs? Such a determination is not necessarily easy. As the dissent in *Baker* noted, "a controversy affecting the Nation's foreign affairs is not a simple mechanical matter"¹⁵⁸ In this vein, how can immediate deference to the executive's understandably biased opinion¹⁵⁹ settle an inherently complex question? Though the *Baker* Court accepted that many cases involving foreign policy "uniquely demand [a] single-voiced

¹⁵⁵ See *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 3–4 (D.C. 2004).

¹⁵⁶ See Choper, *supra* note 44, at 1487 (noting that "the equation changes when a matter of individual rights is involved").

¹⁵⁷ Some Presidents have disagreed. Under the Bush Administration's unitary executive theory, a discussion of which is well beyond the scope of this Article, any matter affecting or relating to the President's powers—foreign policy among them—falls within the executive branch's purview. See John E. Finn, *Book Review*, 18 L. & POL. BOOK. REV. 956 (2008), <http://www.bsos.umd.edu/gvpt/lpbr/reviews/2008/10/terror-presidency-law-and-judgment.html> ("The unitary theory of the executive holds that Article II vests the whole of executive power in the office of the presidency and that such powers are not shared with other branches or even, necessarily, accountable to them."). This theory, however, has been criticized by members of the legal academy. See, e.g., David J. Barron & Martin S. Lederman, *The Commander In Chief At The Lowest Ebb — Framing The Problem, Doctrine, And Original Understanding*, 121 HARV. L. REV. 689 (2008).

¹⁵⁸ *Baker v. Carr*, 369 U.S. 186, 283 n.11 (1962) (Frankfurter, J., dissenting).

¹⁵⁹ The Bush Administration made no secret of its distaste for the ATS. See Hermer & Day, *supra* note 5.

statement of the Government's views,"¹⁶⁰ many others do not. Distinguishing these two sets of cases, and adjudicating those that do not "uniquely demand" deference, cannot be left to an inherently interested party, even if that party is the President of the United States.

As discussed, the dissent (with which the majority agreed) in *Doe v. Exxon* sought to create an answer to this problem in corporate ATS cases.¹⁶¹ It noted that as a matter of law, "[w]hen presented with a suit alleging wrongdoing committed in a foreign country, and particularly a suit implicating the actions of foreign government officials, federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests."¹⁶² However, herein lies the danger. In Judge Kavanaugh's (dissenting) opinion, a harm reasonably explained by the executive is sufficient to render a suit justiciable. Yet there exists a difference between a harm reasonably explained and a reasonable explanation. Only the latter accords with *Baker's* holding that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁶³

The necessary conclusion is that courts must not look at whether the executive has "reasonably explained" the suit's likely harm, but rather at whether *the explanation itself is reasonable*. It is acceptable that the executive, in charge of the nation's foreign policy, will best know the likely foreign policy implications of an ATS lawsuit; but it is not acceptable that such a vantage point confers unquestioned authority. Though courts should continue to give the executive's opinions "serious weight,"¹⁶⁴ they must still weigh them, even if they do place them on the longer arm of the scale.

B. How Courts can Properly Weigh Executive Concerns

1. The Problem

As discussed in Part IV, the move away from a strict *Baker* analysis in ATS cases to a more streamlined two-prong test has resulted in justiciability hinging on the second of the two questions—does the adjudication of the claim unconstitutionally intrude on the executive's foreign policymaking powers and abilities? While the D.C. Circuit would allow this question to be settled by a reasonable State Department explanation, such "uncritical deference"¹⁶⁵ raises serious

¹⁶⁰ *Baker*, 268 U.S. at 211.

¹⁶¹ *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 357 (D.D.C. 2007) (Kavanaugh, J., dissenting).

¹⁶² *Id.* at 363.

¹⁶³ *Baker*, 268 U.S. at 211.

¹⁶⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

¹⁶⁵ See Stephens, *supra* note 18, at 191.

separation of powers concerns. Instead, to determine whether a case is nonjusticiable because its adjudication impairs the president's ability to conduct the nation's foreign policy, the court must decide not whether the State Department has provided a reasonable explanation of the likely harm, but whether the potential harm is inherently real. The courts in *Sarei*, *Exxon Mobil*, and *Rio Tinto* were able to make such a calculation with relative ease because in each of those cases, the executive, through the State Department's statement of interest, did not claim that adjudication was certain to harm the executive's foreign policy-making ability. In *Mujica*, on the other hand, the district court found that the statement of interest explaining that "this case *will* have an adverse impact on the foreign policy interests of the United States"¹⁶⁶ to be dispositive, and ruled the claim nonjusticiable. The executive has no doubt noticed this distinction. *Mujica* then foreshadows the executive's argumentation in future cases that it does not want adjudicated.

The problem with such definitive statements of fact—"this case *will* have an adverse impact"—is that cases and their effects always contain inherent uncertainty. Witness the executive's change in certainty from a recent opinion in the rehearing of *Sarei v. Rio Tinto*.¹⁶⁷ The State Department claimed in its 2001 statement of interest that adjudication "would risk a potentially serious adverse impact on . . . the conduct of our foreign relations."¹⁶⁸ Yet the executive later reversed course, finding the "foreign relations interests . . . as they existed in 2001 [to be] different from the interests and circumstances that exist today."¹⁶⁹ While there is nothing remarkable about the executive changing its opinion at a later time, doing so presents a problem. The executive's prediction about potential harm either changed or did not come true, indicating the inherent uncertainty in an executive prediction regardless of how definitive it may seem.

2. A Solution

The result of this inherent uncertainty must require courts to reassess the degree to which they defer to executive branch judgments. They must find some way to assess the validity of State Department claims. Fortunately, the solution may be relatively simple.

An easy way courts could accomplish this is by seeking verification of executive branch assertions. Upon the receipt of an executive branch brief or statement of interest—which, under 28 U.S.C. § 517,

¹⁶⁶ *Mujica* Statement of Interest, *supra* note 2; *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1169 (C.D. Cal. 2005).

¹⁶⁷ *Sarei v. Rio Tinto, PLC*, 2009 WL 2762635 (C.D. Cal. 2009).

¹⁶⁸ *Sarei* Statement of Interest, *supra* note 3.

¹⁶⁹ *Sarei*, 2009 WL 2762635 at *9.

the executive branch is allowed to submit either with or without solicitation—the court could make the executive’s assertions available to the parties at suit and seek briefing, or even testimony, on the factual foreign policy matters at hand. While this would allow the parties to seek their own foreign policy advisors to weigh in substantively on the executive’s letter, a more efficient solution might also be for courts to circumvent the parties and seek briefing directly from amici or court-ordered witnesses. Though rarely seen at trial this would allow independent experts to weigh in on both the executive’s statements and the potential foreign policy implications.¹⁷⁰ While courts must still afford the executive a certain level of critical deference and treat its contentions with greater regard than those of independent experts,¹⁷¹ they would then be able to make an independent assessment of cases’ potential effects, and decide if they are sufficient to trigger the political question doctrine.

CONCLUSION

The discussion in this article is, to some degree, speculative. In the absence of a Supreme Court ruling, courts cannot completely abandon *Baker* in corporate ATS cases. Nevertheless, they have in fact strayed from that framework and moved towards a simpler means of inquiry. This article seeks to highlight this movement, and note the potential ramifications of this new approach.

The current case law provides reason for concern. *Exxon Mobil* and other cases indicate that courts will likely defer to the executive when the State Department can guarantee detrimental foreign policy implications. Yet the case law also provides hope in that courts have almost unanimously ignored the executive’s pleas for dismissal by requiring absolute certainty—something the State Department knows is rarely possible. While the courts can and should continue to respect and accept State Department opinions and afford them deference, they must also make efforts to actually weigh executive statements with other, independently sourced information. By deferring solely to executive branch analysis in these cases, courts cannot perform the due diligence needed to assess the true likelihood of their impact on executive foreign policymaking. Unless they have all the facts, and unless they actually weigh them, courts cannot make honest political question assessments.

¹⁷⁰ Courts have the power to call their own witnesses under Federal Rule of Evidence 706. This rule allows the courts to “appoint any expert witnesses agreed upon by the parties, and . . . appoint expert witnesses of [their] own selection.” FED. R. EVID. 706.

¹⁷¹ The executive’s opinion is still due “serious weight.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

APPENDIX: MAJOR CORPORATE ATS CASES IN DETAIL

Case Name & Factual background	State Department Letter or Statement of Interest—Date & Important Language	Rationale for Justiciability/Nonjusticiability	Court’s Holding and Rationale (and important and operative language)
Kadic v. Karadzic (2d Cir. 1995) Bosnian citizens of Croat and Muslim descent bring suit against the “president” of the Bosnia-Serb Republic on charges that troops under his command committed tortuous acts, genocide, atrocities, and other crimes in violation of international law and the laws of war.	September 13, 1995 “Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.” ¹⁷²	None. The U.S. Government (Justice Department) informed the court that, in its opinion, the political questions doctrine simply did not apply.	Justiciable. In finding the case justiciable, the court makes sure to note that the Executive branch’s contention that the political question doctrine does not apply is relevant, but by no means dispositive: “Not every case ‘touching foreign relations’ is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. ... Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government’s reply to our inquiry reinforces our view that adjudication may properly proceed.” ¹⁷³

¹⁷² See Kadic Statement of Interest, *supra* note 104.

¹⁷³ Kadic v. Karadzic, 70 F.3d 232, 249–50 (2d Cir. 1995).

<p>Mujica v. Occidental Petroleum (C.D. Cal. 2005) Colombian citizens bring suit against the defendant oil company and a private security contractor, stemming from an incident in which the contractor, in coordination with the Colombian Air Force and on a mission to protect Occidental’s oil facility, dropped a bomb that killed seventeen civilians.</p>	<p>December 23, 2004 “[T]he State Department believes that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States . . . [and] could potentially have negative consequences for [the] bilateral relationship with the Colombian government. Colombia is one of the United States’ closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking. [Such l]awsuits . . . have the potential for deterring present and future U.S. investment in Colombia.” The statement also included a letter from the Colombian government that stated, “any decision in this case may affect the relations between Colombia and the [United States].”¹⁷⁴</p>	<p>U.S. has substantial interests in Columbia, and adjudication will in general negatively impact bilateral relations. Adjudication might also affect Colombia’s willingness to accept U.S. foreign investment, as well as their cooperation in counterterrorism and counternarcotics operations.</p>	<p>Nonjusticiable. The court found that the fourth and fifth <i>Baker</i> factors—impossibility of adjudicating without affording proper respect to the other branches of government, and adherence to a policy decision—apply because adjudication would interfere with “the Executive’s preferred approach of handling the Santo Domingo bombing and relations with Colombia in general.”¹⁷⁵ Note that the court came to this decision in great part by analogizing to the initial decision in <i>Sarei v. Rio Tinto</i>, which was overturned by the Ninth Circuit (see later in this table for full discussion), and that on appeal, the Ninth Circuit ordered the case to be reheard in light of the decision in <i>Sarei</i>.¹⁷⁶ “In <i>Sarei</i>, the court dismissed plaintiffs’ case on political question grounds. In that case, the State Department filed a Statement of Interest indicating that allowing the plaintiffs to proceed with their case would interfere with the efforts of the Papua New Guinea and American governments to reach a</p>
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¹⁷⁴ Mujica Statement of Interest, *supra* note 2, at 1–3.
¹⁷⁵ *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005).
¹⁷⁶ *Mujica v. Occidental Petroleum*, 564 F.3d 1190, 1193 (9th Cir. 2009).

			<p>peaceful end to the conflict giving rise to the suit. The court concluded that allowing the case to proceed, in the face of such a Statement of Interest, would implicate the fourth and sixth <i>Baker</i> factors.</p> <p>...</p> <p>In the instant case, the State Department has filed a Statement of Interest outlining several areas of foreign policy that would be negatively impacted by proceeding with the instant case. In addition, as outlined in that letter, the State Department has expressed its view that this litigation would interfere with its approach to encouraging the protection of human rights in Colombia.</p> <p>... the fourth <i>Baker</i> factor applies to the instant case because proceeding with the litigation would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."¹⁷⁷</p>
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¹⁷⁷ *Mujica*, 381 F. Supp. 2d at 1193–94.

<p><i>In re Agent Orange Product Liability Litigation</i> (E.D.N.Y. 2005) Vietnamese citizens bring suit against corporate manufacturers of the Agent Orange defoliant used during the Vietnam War, seeking compensation for damage to themselves and their lands.</p>	<p>Jan. 15, 2005. “At bottom, this litigation seeks to challenge the means by which the United States prosecuted the Vietnam war, and ineluctably draws into issue the President’s constitutional Commander in Chief authorities and invites impermissible second-guessing of the Executive’s war-making decisions. . . . [T]he Executive branch considered – and repeatedly rejected – the contention that the use of chemical herbicides in Vietnam constituted a violation of the laws of war. . [A]djudication of plaintiffs’ international law claims would require this Court to pass upon the validity of the President’s decisions regarding combat tactics and weaponry” . [B]ecause the Executive branch considered the very questions of customary international law now before the Court, expressly determined that the conduct at issue did not violate such law, and the President himself acted based upon that determination pursuant to his constitutional authority as</p>	<p>President has sole discretion when it comes to the nation’s war-fighting powers. Moreover, because the executive branch determined that the use of Agent Orange did not violate international law, and because the President acted on this determination, the production and use of the chemical are solely matters of Executive Branch concern, and not subject to judicial review.</p>	<p>Justiciable. The court refuses, in the absence of executive actions (such as reparations) that might otherwise address the matter, to accept that this matter is nonjusticiable. The court also declines to accept Executive’s determination that international law does not apply, noting that “[t]he judiciary is the branch of government to which claims based on international law has been committed.”¹⁷⁸ The court then confirms that even though the President authorizes something under his constitutional powers, such authorized acts are not automatically protected by the political question doctrine: “That the case may call for an assessment of the President’s actions during wartime is no reason for a court to abstain. Presidential powers are limited even in wartime. . Authorization by the head of government does not provide <i>carte blanche</i> for a private defendant to harm individuals in violation of international</p>
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¹⁷⁸ *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 69 (E.D.N.Y. 2005).

	Commander in Chief, the President's actions displace any contrary international legal norm as a rule of decision in this case." ¹⁷⁹		law." ¹⁸⁰
<i>Presbyterian Church of Sudan v. Talisman Energy</i> (S.D.N.Y. 2005) Sudanese citizens bring suit against Talisman Energy for colluding with the Sudanese government to commit genocidal acts and commit extrajudicial killings, forced displacement, attacks on civilians, kidnapping, rape, and enslavements, in relation to the company's oil exploration activities. ¹⁸¹	Feb 11, 2005 The State Department uses its letter/statement of interest to (a) lend it support to the Canadian government's argument that the lawsuit improperly claims jurisdiction over Talisman, a Canadian company, and (b)reiterate its amicus argument in <i>Sosa</i> that the ATS was not "intended to open U.S. courts to suits between aliens arising from conduct taking place entirely in other countries." With regard to point a, the State Department noted that, "[W]hen [a foreign government] protests that the U.S. proceeding interferes with the conduct of its foreign policy in pursuit of goals that the United States shares, we believe that considerations of international comity and	International comity, and the preservation of relations between the U.S. and the government of Canada.	Justiciable (so found in ruling on a motion for judgment on the pleadings). The court in this case determined that, in the absence of a direct caution from the State Department that U.S. foreign policy might be affected, the seriousness of the claims outweighed the executive branch's desire: "The United States and the international community retain a compelling interest in the application of the international law proscribing atrocities such as genocide and crimes against humanity. To the extent that the Canada Letter and Talisman's arguments request this Court in its discretion to decline to exercise its jurisdiction over past events in order to avoid conflict with future Canadian foreign policy, the seriousness of

¹⁷⁹ Statement of Interest of the United States, *In re Agent Orange Product Liability Litigation*, States, Jan. 12, 2005 at 1–3.

¹⁸⁰ *Id.* at 64

¹⁸¹ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

	judicial abstention may properly come into play.” ¹⁸²		the alleged past events counsel in favor of exercising jurisdiction. ... In sum, while a court may decline to hear a lawsuit that may interfere with a State’s foreign policy, particularly when that foreign policy is designed to promote peace and reduce suffering, dismissal is only warranted . . . where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public’s interest in vindicating the values advanced by the lawsuit.” ¹⁸³
<i>Doe v. Exxon Mobil</i> (D.C. Cir 2007) Claims brought by Indonesian villagers against Exxon Mobil, charging the oil giant with complicity in rape, torture, and murder of local Indonesians. ¹⁸⁴ State department asked by district court to assess foreign policy implications of the adjudication.	July 29, 2002. “With respect to the litigation, it is the Department’s considered opinion that adjudication at this time <i>could</i> adversely affect [U.S.] interest . . . , recognizing that such effects cannot be determined with certainty. . . . Much of this assessment is necessarily predictive and contingent on how the case	Interference with bilateral cooperation in the fight against international terrorism; chilling effect on Indonesia’s receptiveness to foreign direct investment (particularly in the natural resources sector, in which U.S. companies are heavily involved).	Justiciable. Court Refuses to dismiss on political questions grounds (affirmed by the DC Court of Appeals, cert denied by the Supreme Court): “[The State Department] noted that the effects of this suit on U.S. foreign policy interests “cannot be determined with certainty.” Moreover, the letter stated that its

¹⁸² Letter from William H. Taft, U.S. Department of State, to Daniel Meron, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Feb. 11, 2005 [hereinafter Talisman Statement of Interest].

¹⁸³ Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 WL 2082846 at *7 (S.D.N.Y.).

¹⁸⁴ Cary O’Reilly, *Exxon Mobil Must Face Lawsuit by Indonesian Villagers*, BLOOMBERG, Aug. 27, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=ARYhia8wUENs> (last visited Sept. 30, 2009).

	may unfold in the course of litigation.” ¹⁸⁵		assessment of the litigation was “necessarily predictive and contingent on how the case might unfold in the course of litigation.” Most importantly, the State Department emphasized that whether this case would adversely affect U.S. foreign policy depends upon “the nature, extent, and intrusiveness of discovery.” We interpret the State Department’s letter <i>not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court</i> alerting it to [Executive branch] concerns.” ¹⁸⁶
Sarei v. Rio Tinto (9th Cir. 2007) Claim brought by citizens of Bougainville, Papua New Guinea, against international mining conglomerate. Defendant is alleged to have committed a number of human rights violations in concert with the PNG government and participate in a blockade which denied the plaintiffs access to medicine and supplies, in addition having caused serious environmental destruction of the locals’ towns and lands.	October 31, 2001 “The success of the Bougainville peace process represents an important United States foreign policy objective as part of our effort at promoting regional peace and security. In our judgment, continued adjudication of the claims . . . would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations. . . . Clearly the PNG perceives the potential impact of this	Interference with the internal affairs of a U.S. ally (by threatening the Bougainville peace process).	Justiciable. Though the district court initially found the case nonjusticiable, the court of appeals explained that, based solely on the facts initially available to the court, the case seems entirely justiciable, and not rendered nonjusticiable by the political question doctrine: “We first observe that without the SOI, there would be little reason to dismiss this case on political question grounds, and therefore that the SOI must carry the pri-

¹⁸⁵ Exxon Statement of Interest, *supra* note 1, at 2.

¹⁸⁶ Doe v. Exxon Mobil Corp., 473 F.3d 345, 354 (D.D.C. 2007) (emphasis added).

<p>State department asked by the court to comment on how adjudication would affect U.S. Foreign Policy.</p>	<p>litigation on U.S.-PNG relations and wider regional interests, to be very grave. We cannot lightly dismiss such expressions of concern from a friendly foreign state.”¹⁸⁷</p>		<p>mary burden of establishing a political question. . . . [T]hese claims can be distinguished from cases in which the claims by their very nature present political questions requiring dismissal.”¹⁸⁸</p> <p>Moreover, even in light of the SOI, the court indicated that mere “embarrassment” to the USG (and its effect on interstate relations) is not a sufficient reason to rule this a political question: “The State Department explicitly did <i>not</i> request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear. Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. We are mindful of <i>Sosa</i>’s instruction to give “serious weight” to the views</p>
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¹⁸⁷ Sarei Statement of Interest, *supra* note 3, at 2.
¹⁸⁸ Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1206 (9th Cir. 2007).

			of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOL.” ¹⁸⁹
<p><i>Matar v. Dichter</i> (S.D.N.Y. 2007) Claims brought by Palestinian citizens against the head of Israel’s General Security Services, stemming from an incident in which Israeli forces dropped a one-ton bomb on a Gaza building, killing fifteen civilians and wounding scores of others.</p>	<p>November 17, 2006 This Statement of Interest takes the form of a longer, legal brief, as opposed to the shorter targeted letter common in most of the other discussed cases. However, it does mention (and the court picks up on) the State Department’s potential foreign policy concerns: “Given the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad – including damages suits arising from alleged war crimes. . . . It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn. . . .</p>	<p>Potential to impair general foreign policymaking functions by potentially submitting U.S. officials to similar litigation in other countries; Interference with executive’s ability to manage the Israeli-Palestinian crisis.</p>	<p>Nonjusticiable. In deciding that the political question doctrine applied, the court was heavily influenced by the executive’s statement of interest, distinguishing the case at hand from <i>Kadic</i> and <i>Sarei</i> because here there existed a specific “request for dismissal from the Department of State and the government of the foreign state.”¹⁹⁰ The court continued by highlighting that this case “involves the response to terrorism in a uniquely volatile region. This Court cannot ignore the potential impact of this litigation on the Middle East’s delicate diplomacy. As noted by the Government, the claims asserted by Plaintiffs “threaten to enmesh the courts in policing armed conflicts across the globe—a charge that would exceed judicial competence and intrude</p>

¹⁸⁹ *Id.* at 1206–07.

¹⁹⁰ *Mater*, 500 F. Supp. 2d. at 295.

	<p>Moreover, such suits would subject the foreign states and officials involved to the burdens and embarrassments of litigation, leading to strains in U.S. relations.</p> <p>...</p> <p>[S]uch litigation would [also] undermine the Executive's ability to manage the conflict at issue through diplomatic means."¹⁹¹</p>		<p>on the Executive's control over foreign affairs." (Statement of Interest at 3.) Allowing this case to proceed "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all." (Statement of Interest at 45.) Consideration of the case against this unique backdrop would impede the Executive's diplomatic efforts and, particularly in light of the Statement of Interest, would cause the sort of intragovernmental dissonance and embarrassment that gives rise to a political question."¹⁹²</p>
<p><i>Corrie v. Caterpillar</i> (9th Cir. 2007) Relatives of an American activist and several Palestinian families bring suit against Caterpillar for selling its bulldozers to the Israeli government while knowing that the bulldozers would be used to destroy homes in contravention of international law.</p>	<p>NA. Defendant Caterpillar corporation asked the district court to solicit the views of the Department of State, however the court declined.</p>	<p>NA. The executive branch declined to offer its views on the matter.</p>	<p>Nonjusticiable. The court found that because the bulldozers were essentially part of a grant to Israel given by the U.S. government (and thus a direct foreign policy decision), their involvement in the incident and deaths was a direct consequence of U.S. foreign policy: "The executive branch has made a policy determination that Israel should purchase Caterpillar bulldozers. It advances that determination</p>

¹⁹¹ Statement of Interest of the United States, *Mater v. Dichter*, Oct. 7, 2003, at 22, 45.

¹⁹² *Mater*, 500 F. Supp. 2d at 295.

			<p>by financing those purchases under a program authorized by Congress. A court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel.</p> <p>...</p> <p>It is not the role of the courts to indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide. 'Any such policy condemning the [Israeli government] must first emanate from the political branches.'¹⁹³</p>
<p><i>In re South African Apartheid Litigation</i> (S.D.N.Y. 2009) The combination of a number of independent claims against corporations charged with doing business and aiding/abetting in South African government apartheid policies that violated customary international law.</p>	<p>October 27, 2003 "Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, . . . adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's ongoing efforts at reconciliation and equitable eco-</p>	<p>Bilateral relations with South Africa in general, as well as bilateral and multilateral relations with other developing countries; Chilling effect on American foreign investment; Interference with actions already undertaken by foreign country, and potential to undermine those actions.</p>	<p>Justiciable. The court found that engaging in business merely because the executive branch permitted such activities does not constitute a political question. Moreover, the court rebuked the executive branch what it saw as faulty legal reasoning in its statement of interest. "[I]t is a <i>non-sequitur</i> to argue that a suit alleging that a defendant wrongfully engaged in commerce would implicate the political question doctrine. Because the United States' Statement of Interest relies on the identical, erro-</p>

¹⁹³ Corrie v. Caterpillar, Inc., 503 F.3d 974, 983–84 (9th Cir. 2007).

	<p>conomic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.</p> <p>...</p> <p>[T]he prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage the U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions.</p> <p>...</p> <p>To the extent that the apartheid litigation in U.S. courts deters such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.”¹⁹⁴</p>		<p>neous premise, considerably less deference is owed to its ultimate conclusions. To the extent the Executive Branch suggests that a prohibition on knowingly providing substantial assistance to violations of the law of nations would have a substantial chilling effect on doing lawful business in a pariah state, the suggestion is speculative at best. Moreover, the assertion in the Statement of Interest that this litigation “will compromise a valuable foreign policy tool” is true only “[t]o the extent that the apartheid litigation in U.S. courts deters such investment.” The Statement of Interest never states that this litigation <i>will</i> necessarily deter such investment, and there is no reason to believe based on the pleadings that these cases—viewed in light of the applicable law—will have such an effect.”¹⁹⁵</p>
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¹⁹⁴ Letter from the Legal Advisor of the Department of State, Oct. 27, 2003 (excerpts available in *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 297–98 (2d Cir. 2007)).

¹⁹⁵ *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 284 (S.D.N.Y. 2009).

